UB Law Forum

Volume 6
Number 2 *Spring/Summer 1992*

Article 5

4-1-1992

The Supremes: How a Father-Daughter Team Made its Painful Way to the Big Leagues—The U.S. Supreme Court

UB Law Forum

The Supremes

How a father-daughter team made its painful way to the big leagues — the U.S. Supreme Court

By Lucinda M. Finley

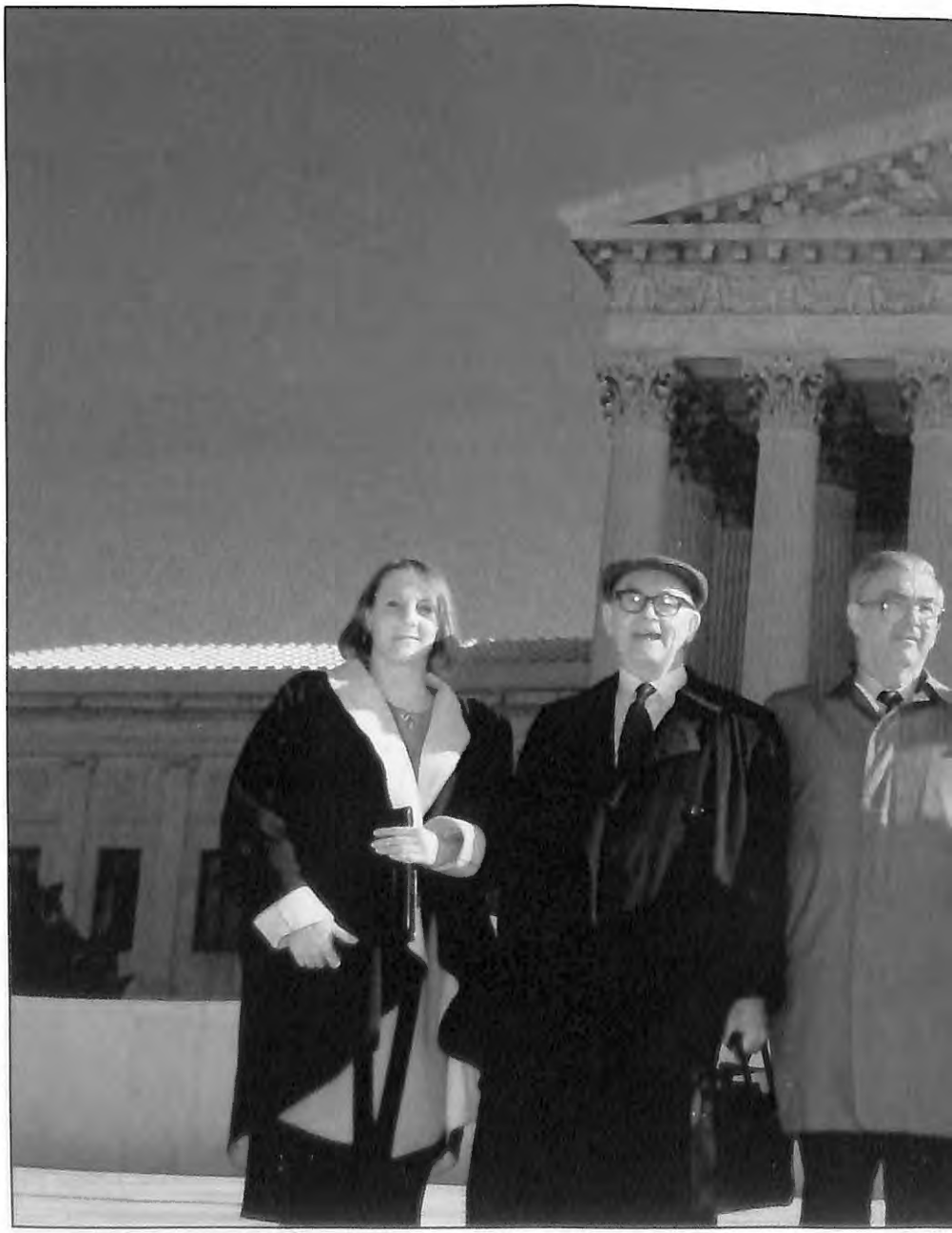
On the day after the first Monday in October 1991, I received the long-awaited phone message from my father. "I have just two words to tell you," said his voice on my answering machine. "Certiorari granted."

I phoned back to his Baltimore office. When he answered the phone, I blurted out: "Oh my God, I'm so excited, but I know I shouldn't be — I've never been so enthusiastic over what technically is a legal defeat.

"But wow, we're going to the Supreme Court!"

My father, Joseph E. Finley, and I were now officially counsel for the respondents before the Supreme Court of the United States in case No. 91-42, United States of America v. Therese Burke, et al., on writ of certiorari from the U.S. Court of Appeals for the Sixth Circuit. The question presented: whether the back-pay recovery in a Title VII employment discrimination case was excluded from income tax under section 104(a)(2) of the Internal Revenue Code as "damages received on account of personal injury."

Despite 100-to-1 odds, we had expected that the Court would take the case. It had numerous "cert-worthy" factors. The Solicitor General's office filed the petition on behalf of the Internal Revenue Service; there was a conflict in the circuits; and the Solicitor General said the conflict made it impossible for the IRS to administer the tax laws.



Left to right: Lucinda M. Finley, Joseph E. Finley and union representatives.

Our Supreme Court case had its origins 10 years ago, in a difficult contract renegotiation between the Office and Professional Employees International Union, for which Joe Finley was the longtime general counsel, and the Tennessee Valley Authority. The TVA insisted on changing the way it calculated the salaries for jobs in the female-dominated clerical job schedules, a change that was designed to cut the pay rates in these jobs while leaving undisturbed or raising the rates of pay in the male-dominated job schedules. The union helped the workers to file discrimination charges and later joined a Title VII suit filed in federal district court alleging that the pay rate change constituted sex discrimination.

At the outset of the case, my involvement was simply as the interested daughter concerned about women's rights and recently graduated from law school, following my father's legal exploits. Joe extracted from TVA officials an internal study about the contemplated change, indicating that they were fully aware its principal effect would be to reduce women's pay.

TVA confidently filed a motion for summary judgment. In a strongly worded opinion finding that the evidence gleaned through discovery demonstrated a prima facie case of intentional discrimination, the district judge denied TVA summary judgment. Within days, the agency put a generous settlement offer on the table.

During settlement negotiations, the subject of taxes arose. TVA, as the employer, was concerned that if it didn't withhold income and FICA taxes it would be subject to penalties. But Joe insisted that the portions of the settlement recovered by individual class members were damages for the personal injury of sex discrimination, and thus not subject to tax.

The union did not have the resources to distribute the $5 million settlement proceeds to the several thousand eligible workers, and TVA insisted that if it did the distribution, it had to withhold taxes. Rather than jeopardize the settlement over this issue, the union acceded, but told the workers that it would help them with tax refund claims.

Over the next couple of years, Joe Finley's office became claims processing central for thousands of IRS refund claims and denial letters. Each day's mail brought hundreds of certified letters. As the statute of limitations neared for challenging the first wave of IRS refund denials, Joe filed a refund suit in U.S. district court.

The taxpayers lost in district court — there were conflicting Tax Court opinions on the taxability of Title VII recoveries, and the district court followed the one that said the recovery was akin to deferred wages, rather than injury damages, and thus taxable. After the case was briefed in the Sixth Circuit, that court issued an opinion finding age discrimination awards to be for personal injury and thus non-taxable. Predictably, in Burke, the Sixth Circuit found that age and sex discrimination were both personal injuries and should receive the same tax treatment. My interest in the case was piqued as my father shared the news of his Sixth Circuit victory with me.

"The government lawyer tells me they're seriously evaluating whether to file cert," he told me.

And thus what started as a Title VII case for intentional sex-based wage discrimination did indeed wind up in the U.S. Supreme Court as a tax case.

Since the mid-1980s the government had been losing section 104(a)(2) cases dealing with age discrimination, section 1981 race discrimination, wrongful discharge and defamation fairly consistently in the Courts of Appeals and Tax Court, but our case was the one that finally presented a conflict in the circuits on the specific question of Title VII recoveries, and thus presented the government with an occasion to seek Supreme Court review.

It was also evident from the cert petition that the United States was hoping to use Burke to resolve far more than the Title VII issue, for it said there should be no difference in the tax treatment of age discrimination, race discrimination and sex discrimination awards.

We understood the importance and challenge of the task before us. One of my first decisions was to cast the brief in a way that took the focus off tax law and put it on discrimination. The issue, I said, was the nature and meaning of discrimination against the person. Was this an injury, an assault on dignity and humanity, or simply an affront to the pocketbook?

My father and I had never worked together on a case before, yet I gave this little thought. First, someone who thrives on writing appellate briefs, as I do, won't find reasons to duck when someone throws the plum of writing a Supreme Court merits brief in one's lap. But, more importantly, we both respected each other's abilities, and we had a warm and open relationship. If any parent/child friction cropped up, the fact that we were located in different cities with the mediating devices of the phone and fax would help us through any rough spots.

Because the Court had accepted so few cases at the beginning of the new term, each was put on a fast track toward argument in January 1992. The petitioner's brief was due just before Thanksgiving; our brief had to be submitted Dec. 23.

Oh well, I thought, there goes my winter break from teaching, and forget Christmas shopping. My father was busy with another case in federal district court, so we agreed that I would take principal responsibility for researching and drafting the brief.

One aspect of my recent amicus brief writing experience that I had found most rewarding was the opportunity to exchange ideas on drafts with other top-notch lawyers working on the cases. So I volunteered to coordinate potential amicus parties. Little did we know how much interest the case would generate. Civil rights groups, plaintiffs lawyers with Title VII and age discrimination back pay awards at stake, and employers' lawyers — all wanted to participate as amicus curiae. We wound up with nine briefs in support of our position; predictably, no one came in on the side of the government.

By early November we were progressing well, discussing ideas about how to present the arguments in the brief. We agreed it was time to sit down face to face, share research results and start drafting an outline. Our aim was to be ready to start writing as soon as we received the government's brief.

Joe flew to Buffalo the first weekend in November, and the first of our "health disaster obstacles" struck. Just before going to pick him up at the airport, I went to ride my horse. It was a windy day, and something spooked her. As she gave an energetic buck, I went ignominiously flying off, and my ankle collided with her back hoof. The result — a broken ankle and 3 1/2 weeks in a cast for me.

Now I had an extra challenge — my mobility was greatly reduced, and carrying books from the library shelf to a carrel or to my office was a daunting task. Over Thanksgiving, I went to Baltimore and indulged in every child's fantasy — ordering

one's parent around and having him wait on you hand and foot! My father and I ensconced ourselves in the University of Baltimore law library, and I called out cites to him as he scurried around fetching books for me.

We also spent several vigorous hours dissecting the government's brief, which we had just received. It was not a model of clarity; indeed, it seemed intentionally ambiguous on issues such as whether section 104(a)(2) of the Code applied to non-physical as well as physical injuries, how wage-based portions of injury recoveries were to be treated for tax purposes and whether that treatment should differ according to whether the injury was physical or non-physical, and on the nature of the injury of discrimination. I was surprised that the brief never tried to define what was a personal injury within the meaning of the statute.

The brief also was silent as to the impact of the Civil Rights Act of 1991, signed into law by the president the day the brief was filed. This law amending Title VII made significant changes in the measurement of damages, expanding them beyond compensation only for wage loss. Yet despite this change, the government asserted that Title VII did not recognize emotional and other non-pecuniary loss.

This brief suggested ways to cast our argument. We would stress, again and again, the language of the statute and the regulation, and sprinkle the brief with cites to cases about interpreting a statute first with reference to its plain meaning. The statutory language made none of the distinctions the government appeared to be urging — it did not distinguish between physical and non-physical injuries; nor did it distinguish between the portion of damages intended to compensate for lost income and the portion intended to compensate for non-pecuniary harm. We would also stress the new Civil Rights Act.

Just when I thought I was finally ready to write, we had a major substantive wrench thrown our way. A case raising the identical issue — the taxability of Title VII back pay awards — had been argued before the D.C. Circuit in September. The parties in that case, *Sparrow*, had promptly informed that court when the Supreme Court granted cert, and we all assumed the D.C. Circuit would refrain from deciding *Sparrow* until the Supreme Court resolved the issue.

No such luck; presumably thinking the Supreme Court could benefit from its wisdom, which deviated so sharply from that of the Sixth Circuit, the day before Thanksgiving they found that Title VII back pay awards were fully taxable. The real wrench was that the D.C. Circuit based its decision on a ground not even argued by the government to the Supreme Court. Section 104(a)(2) speaks of excluding "damages," reasoned the D.C. Circuit. Title VII back pay is considered an equitable award; damages are a "legal" remedy, ergo back pay is not "damages."

Suddenly I was limping off to read dictionary and C.J.S. definitions of damages; I was leafing through musty old 19th century treatises on equity jurisprudence, such as Story on Equity. We would demonstrate to the Supreme Court that the D.C. Circuit was wrong in its fundamental premise — courts in equity could award compensatory monetary remedies when necessary to do complete justice, and such awards are damages.

When *Sparrow* first came down, my father reacted that it was a disaster for us. The D.C. Circuit was a tremendously influential court of appeals. I reassured him: "Because it came down this week, instead of last week, we now get first crack at it and get a chance to demolish it before the government can say anything at all."

When I sat down over the Thanksgiving weekend to write the first draft of our brief, demolishing *Sparrow* was uppermost in my mind. Consequently, the first draft focused far too defensively and extensively on this case and its distinctions between law and equity. Aided by the comments of several attorneys to whom

> "At the outset of the case, my involvement was simply as the interested daughter concerned about women's rights and recently graduated from law school, following my father's legal exploits."

we sent the draft, when I did a second draft, I returned the focus to the language and meaning of section 104(a)(2) and the nature of discrimination.

We put the brief through several redrafts. At each stage I reorganized text, added and eliminated arguments, and improved the focus.

As the deadline drew near, I was also fielding many anxious calls from amici, wanting to make sure the proper letters of consent from the parties to the filing of their briefs were in order. The deadline pressure was getting us all a bit frayed. By the time we sent the brief to the printer I was exhausted.

Several rounds of proofreading later, the brief was put to bed and filed only two days before Christmas. Both my father and I were too wound up to feel much Christmas enthusiasm. I just wanted to sleep, but the oral argument was less than a month away.

I sensed that the subject of the oral argument would produce the first serious conflict between us. As principal author of the brief, I felt that I now was immersed in the issues and precedent more thoroughly than my co-counsel, and I desperately wanted to present the argument. The brief was 90 percent or more of the ballgame, but the oral argument was the glamour moment, face to face with the Justices.

It had been assumed all along that my father would present the argument, but I raised the delicate question. "I think you do know it better right now and would probably do a better job," my father said. "But for client relations it is essential that I present the argument." I said I understood, and threw myself into the task of pouring my instant command of the cases and principles into his head.

Just when we thought everything would now sail smoothly up to the argument, with Joe taking a chunk of uninterrupted time to study and prepare and two moot court dry runs scheduled before groups of savvy Washington lawyers, our second "health disaster obstacle" struck. On New Year's Day, while reaching for something high on a bookshelf in his office, Joe slipped and fell on his back. A fractured lumbar vertebra was the doctor's verdict; several weeks in bed, on painkillers, on heating pads, and lifting nothing, was the prescription.

But the doctor rose to the challenge of getting his patient ready to travel to Washington and stand up pain-free for an hour to argue the case. I went to Baltimore to do dual duty as co- counsel and as daughter to help take care of my father.

We had scheduled one moot court for the Friday before the Tuesday argument, and another for the Monday immediately before argument day. At the first moot, it was evident that Joe had been hampered in his preparation by the time lost to his back and to other urgent business. The assembled group of lawyers, me included, threw questions at him rapid fire, and he tended to evade the more difficult ones, or to take too long in the windup. In the group discussion afterward, several bright minds kicked around how best to answer the questions that had come up. He and I then spent the long hard hours over the weekend that we had not had up to that point, going over possible questions and themes for the argument. We both knew that the allotted 30 minutes was simultaneously an eternity and no time at all.

At the second moot he was in much stronger command, and held up remarkably under aggressive questioning. Much of the questioning concerned hypotheticals that we thought the Court was likely to ask, exploring the breadth of the implications of our position that employment discrimination was a personal injury. If so, then what about Fair Labor Standards Act violations? What about unfair labor practice back pay awards? What about Landrum-Griffin internal union member rights? What about wrongful-discharge tort claims?

Joe and I stayed in a hotel in Washington the night before the argument, to be free from the distractions of family. Every family member, some friends, my father's doctor, the doctor's 12- year-old daughter — all planned to attend the argument.

Jan. 21, 1992, was a bright, cold morning. We met our family and guests outside the marshal's office, and then proceeded to the lawyers' lounge. I was feeling a great deal of nervous anticpation, and was actually glad that I wouldn't be arguing. At least I was able to eat breakfast, something I surely wouldn't have been able to do had I been presenting the argument.

My nerves led me to search for a bathroom, but to my chagrin the only restroom in the lawyers' lounge said "Men." Women lawyers had to go down a couple of halls to a public bathroom. "Women still are suspect citizens here," I thought.

The personnel from the clerk's office gave us some pointers about how to avoid annoying certain Justices. "Always remember to address the Chief Justice as Chief Justice," we were cautioned. "Do not call him simply 'Justice.' 'Your honor' will always do, too, for any one of them.

"Be sure to directly answer the question before going into any explanation or qualification," we were advised. "Justice White, in particular, can get annoyed if you appear to be avoiding the question.

"Always address the most recent question — if one Justice interrupts another or interrupts your answer, proceed to address that most recent

question."

We were the first argument that morning, so we proceeded into the courtroom to take our seat at counsel table. The marble-pillared room, with its carved and gilded ceiling and velvet drapes, is a fitting setting for audiences before the high priests of our secular religion. The bench loomed large right in front — one had to crane one's neck to see which Justice was speaking. Each counsel was provided with a feather quill pen, both a left-handed pen and a right-handed quill, to keep as a souvenir. We exchanged pleasantries with our opposing counsel from the Solicitor General's office, attired, as is traditional for the government lawyers, in a full formal morning suit.

At the stroke of 10, the red velvet curtains parted and the robed Justices emerged. "Oyez, oyez," intoned the Clerk of the Court. "All persons having business before the honorable, the Supreme Court of the United States draw near. God save this honorable court." Chief Justice Rehnquist called our case number, and we were under way.

As the petitioner, the assistant to the Solicitor General went first. To my surprise, he did place heavy reliance on *Sparrow*, but Justice Scalia quickly cut him off, indicating that that was just a ruling from the D.C. Circuit to which they didn't have to pay much attention.

The questions came fast, but always with great courtesy. While arguing that the discrimination here wasn't a personal injury, Justice O'Connor broke in and asked: "What about sexual harassment? Do you consider that a personal injury?" I sensed a slight intake of breath from the audience as the lone female Justice asked that question, and I snuck a glance at the audience behind me which revealed several pairs of eyes riveted on Justice O'Connor and the Justice next to whom she was seated — the newest member of the Court, Justice Thomas.

The government lawyer ducked the hard question about sexual harassment. "The Internal Revenue Service has not yet taken a position on that," he responded.

Suddenly, it was Joe's turn at the podium. He, too, started receiving questions almost as soon as "May it please the court" had escaped from his lips. Again, Justice Scalia, ever the Socratic law professor, was the most active questioner. Virtually all the questions had been anticipated at our moots, and I glowed as Joe fielded them, confidently, as we had rehearsed. "What about the Fair Labor Standards Act?" Justice Scalia asked. When Joe responded that that act secured personal rights, so that failures to pay the minimum wage or overtime pay would be tax- exempt personal injury recoveries, Justice Scalia responded: "I think that's right, and that's what I'm afraid of. How much is this going to cost the Treasury if we rule in your favor?"

For the only time that morning, I thought an unfair question had been asked. I wished for a moment that the requirement of absolute courtesy could be dispensed with and that Justice Scalia could be told he wasn't on the side of Capitol Hill that should be concerned with such a question.

Far more politely than I might have done, Joe got the point across. "Of course, your honor, we don't know how much tax revenue in general is at stake. I suppose that depends on how many violations of personal rights occur in any given year. And in any event, if Congress becomes concerned that their exemption for personal injury recoveries is too costly, Congress is free to amend section 104(a)(2)."

"Yeah, Dad," I said to myself.

A tension-breaking moment of humor was injected into the argument when Justice Souter inquired whether economic injury was really the graven of the harm in this case. "If you couldn't prove wage loss, you couldn't have won?" he asked. "No," Joe started to explain, when Justice Souter shot back, "Well, then you should have lost." "Not with the proof of intent to discriminate that I came up with, your honor!" replied Joe, as Justice Souter, his colleagues and the audience let out a friendly laugh.

The red light came on, and it was all over. As the argument ended and we all assembled in the hallway outside, I felt a great sense of anticlimax. The case that had been the focus of our attention since October, and had consumed virtually every waking moment since Thanksgiving, was done, out of our hands.

Now we are in what I call the postscript phase — waiting for the decision. And our father-daughter legal collaboration goes on. Besieged with more litigation than anyone can handle, my father had brought me into some of his other cases, and even sent me off by myself to argue a case in the D.C. Circuit. Because he has rarely allowed other attorneys to take major responsibility in his cases, I appreciate how much his vote of confidence in me means, as a lawyerly and a fatherly judgment. ■

Editor's note: *As this issue of the UB Law Forum went to press, the Supreme Court ruled that people who receive back pay after winning federal job-bias lawsuits must pay income taxes on that money. Voting 7-2 , the justices overturned a lower court ruling and agreed with the Internal Revenue service that such compensation is taxable.*

Lucinda Finley, *a UB law professor, received her B.A. from Barnard College and her J.D. from Columbia University. An associate professor of law at Yale University before coming here, she was a lecturer at the University of Sydney in Australia and has practiced privately with the Washington, D.C. law firm of Shea and Gardner. Her teaching interests include feminist theory, tort law, reproductive issues and employment law.*